IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN HOPKINS, in his own separate, Right,	)	**No. 27323-7-III**
	)	
Appellant,	)	**Division Three**
	)	
v.	)	
	)	**UNPUBLISHED OPINION**
BILL HEPLER and ILENE HEPLER, Husband and wife, and B & B FOODS, INC., a Washington corporation,	)	
	)	
Respondents.	)	
	)	

Kulik, J. — John Hopkins filed suit against Bill and Ilene Hepler, and B&B Foods, Inc., alleging breach of the Heplers' proposal to employ Mr. Hopkins and to sell him their pizza business. The trial court granted summary judgment in favor of the Heplers and B&B Foods.

The proposal was indefinite, vague, and incomplete such that its acceptance did not result in an enforceable agreement. We conclude that there are no genuine issues of material fact as to the existence of an enforceable agreement between the parties. Accordingly, we affirm summary judgment.

FACTS

The Heplers established B&B Foods, Inc., which owns the assets and operates Big Cheese Pizza.

Mr. Hopkins worked for the Heplers at Little Caesar's Pizza between 1992 and 1998. In 1998, Mr. Hopkins left Little Caesar's Pizza and accepted employment at RHL Design in Bellevue. In August 2001, Mr. Hopkins learned that the Heplers wanted him to return to Walla Walla to work at Big Cheese Pizza. Mr. Hopkins attended a meeting with the Heplers to discuss their proposal for his return.

The proposal set forth Mr. Hopkins's compensation, including bonuses, paid vacation, health insurance, and an estimated salary if he returned to Big Cheese Pizza. The proposal also stated:

> At the end of seven years, I would be 59 and I want to be retired totally from the business.
>
> I would like to get away from the store in the summer time and a couple of other weeks during the school year with Ilene.
>
> At the end of the 7 years, I would sell you the store for [$]8,000 per year for 4 years [$32,000] total. This would be [paid] to Ilene and then invested in her 401 and Roth IRA. The actual value of the store would be about $350,000, if it is averaging about $9,500 per week.
>
> Would like to see you and Jen in partners in the store, possibly.

> Long before the sale, we would look at [transferring] partial ownership as far as pay advantages to you and the company.

Clerk's Papers (CP) at 7.

At the end of the meeting, Mr. Hopkins told the Heplers that he would look at the proposal and get back to them. Mr. Hopkins accepted the offer but now states that he would not have accepted the proposal without the Heplers' promise to sell him the store. In contrast, the Heplers assert that there was no agreement to sell the business because the proposal was merely a set of talking points for discussion at the meeting.

In reliance upon the Heplers' proposal, Mr. Hopkins quit his job at RHL. As a result of Mr. Hopkins's departure from RHL, he lost $50,000 in stock options and incurred $1,200 in moving expenses.

On November 4, 2001, Mr. Hopkins began work as the manager of Big Cheese Pizza. In accordance with the proposal, he received a salary of $2,000 per month, plus bonuses. Initially, the Heplers paid for Mr. Hopkins's health insurance, but eventually, he was covered by his wife's insurance and the Heplers paid Mr. Hopkins $50 per month.

The Heplers contend that on November 29, 2004, they met with Mr. Hopkins to discuss his deficiencies as a manager. According to the Heplers, during this meeting Mr. Hopkins was informed that the Heplers did not intend to sell him the business. Mr. Hopkins contends that he was not informed of the Heplers' refusal to sell him the

business until September 2006.

On September 26, 2006, Mr. Hopkins sent the Heplers a letter of resignation giving two weeks' notice. In November 2006, Mr. Hopkins filed suit against the Heplers and B&B Foods, alleging breach of the August 2001 proposal. Mr. Hopkins requested an order confirming the sale of Big Cheese Pizza to him or, in the alternative, damages for breach of the agreement.

The court denied the Heplers' motion to dismiss Mr. Hopkins's complaint. The Heplers then filed a motion for summary judgment, arguing that the proposal for the sale of the business was uncertain and, therefore, unenforceable. The court granted the Heplers' motion for summary judgment. This appeal followed.

ANALYSIS

Summary judgment orders are reviewed de novo. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007). This court views the facts in the light most favorable to the nonmoving party. A question of fact may be determined as a matter of law where reasonable minds could reach one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 704, 887 P.2d 886 (1995) (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). If the moving party meets the initial burden of showing the absence of a genuine issue of material fact, the nonmoving party must make a showing sufficient

to establish all essential elements to his or her claim. *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196 (1997). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Citizens For Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 630, 71 P.3d 644 (2003).

Enforceable Agreement. "It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time." *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980). Mutual assent takes the form of an offer and an acceptance. *Yakima County (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993) (quoting *Nimmer*, 25 Wn. App. at 556). An intention to do a thing "is evidence of a future contractual intent, not the present contractual intent essential to an operative offer." *Nimmer*, 25 Wn. App. at 556. An agreement which requires a further meeting of the minds in order to be complete is not enforceable. *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957).

The terms to which the parties assent must be sufficiently definite to be enforceable. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004). If an offer is so indefinite or vague or incomplete that a court cannot decide

what it means and fix the legal liability of the parties, its acceptance cannot result in an enforceable agreement. *Sandeman*, 50 Wn.2d at 541. The question of whether there is mutual assent is generally left to the trier of fact. *Sea-Van Inv. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

Mr. Hopkins argues that the sale provisions of the Heplers' proposal constitutes an offer because the proposal is detailed, is directed at one person, and uses language that was associated with a promise. Mr. Hopkins also points out that the relationship between the parties was arms-length and that the surrounding circumstances involved an effort to induce Mr. Hopkins to return to Walla Walla to work for the Heplers. Mr. Hopkins contends that, at the very least, the question of mutual assent should be left to the jury.

The proposal provisions concerning the sale stated that:

> At the end of the 7 years, I *would* sell you the store for [$]8,000 per year for 4 years [$32,000] total. This would be [paid] to Ilene and then invested in her 401 and Roth IRA. The actual value of the store *would* be about $350,000, if it is averaging about $9,500 per week.
>
> *Would* like to see you and Jen in partners in the store, possibly.
>
> Long before the sale, we *would* look at [transferring] partial ownership as far as pay advantages to you and the company.

CP at 7 (emphasis added).

The use of the word "would," when used in its auxiliary function, expresses a

wish, desire, or intent. Webster's Third New International Dictionary 2637-38 (1993).[1] "But an intention to do a thing is not a promise to do it." *Meissner v. Simpson Timber Co*., 69 Wn.2d 949, 957, 421 P.2d 674 (1966). Instead, an intention to do something "is evidence of a future contractual intent, not the present contractual intent essential to an operative offer." *Nimmer*, 25 Wn. App. at 556. The proposal is indefinite because the use of the word "would" in the sale provisions is indefinite, vague, and incomplete.

The repeated use of the word "would" is also problematic. The proposal states: "I would sell you the store" and moves on to: "Would like to see you and Jen in partners in the store, possibly," and "Long before the sale, we would look at [transferring] partial ownership." CP at 7. Read together, these statements appear to be a list of wishes or hopes, not promises.

The proposal is also vague and incomplete because the sale terms indicate that most of the details of the potential sale were not included. The word "store" is vague. Big Cheese Pizza does not own the building that the pizza business is in. Does the term "store" include delivery trucks? And does the word "store" include the name—Big Cheese Pizza? Mr. Hopkins maintains that the lease is not included in the proposal, but

[1] "Would" has 12 definitions. Number 7 is "could" as in "no stone would shatter that glass," or "the barrel would hold 20 gallons." Webster's, *supra*, 2638. These examples involve concrete physical properties. More importantly, "could" implies ability, not agreement.

he says nothing about whether the name was included.

Significantly, the proposal makes no mention of B&B Foods, which owns and operates Big Cheese Pizza. Because the location of Big Cheese Pizza was apparently not included in the proposal, the purchase price may have been limited to equipment and inventory. However, it was unclear whether the sale also included shares of stock and liabilities.

Importantly, the terms to which the parties assent must be sufficiently definite to be enforceable. *Keystone*, 152 Wn.2d at 178. Here, the terms of the proposal are too indefinite, vague, and incomplete to be enforceable. At best, the proposal is an agreement to agree or an agreement to do something that requires a meeting of the minds. *See Sandeman*, 50 Wn.2d at 541-42. Mr. Hopkins testified that he thought the Heplers would prepare a formal contract for the sale of the store.

Citing *Hedges v. Hurd*, 47 Wn.2d 683, 289 P.2d 706 (1955) and *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 675 P.2d 1266 (1984), Mr. Hopkins argues that if an agreement is too indefinite to be specifically enforced, the agreement may be certain enough to give rise to a claim for breach of contract. However, *Hedges* and *McEachern* are not helpful to Mr. Hopkins because, in those cases, the courts found a valid contract. *McEachern*, 36 Wn. App. at 579; *Hedges*, 47 Wn.2d at 686-87. Here,

there was no valid contract for the sale of the "store."

Mr. Hopkins relies heavily on *Flower v. TRA Industries, Inc*., 127 Wn. App. 13, 111 P.3d 1192 (2005) and *Ebling v. Gove's Cove, Inc*., 34 Wn. App. 495, 663 P.2d 132 (1983). These cases involved bilateral contracts. In a bilateral contract, the parties' promises, not their performance, make the contract. *Flower*, 127 Wn. App. at 27 (quoting *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990)).

Wesley Flower promised to accept a position at Huntwood, sell his house, and relocate. Tim Hunt promised to terminate Mr. Flower only for good cause. *Id.* Mr. Flower sued when he was terminated by Mr. Hunt. The court granted summary judgment in favor of Mr. Hunt. *Id.* at 25. On appeal, the court concluded that the exchange of these promises constituted a bilateral contract. The court concluded, among other things, that there were questions of fact as to whether Mr. Flower was terminated, whether Mr. Flower's signed acknowledgement of the employee handbook was a final expression of a fully-integrated agreement, and whether Mr. Hunt intended on keeping his promise when it was made. *Id*. at 26, 30, 32-33.

Mr. Hopkins argues that the court in *Flower* found a bilateral contract based on Mr. Flower's promise to relocate and work for Huntwood. According to Mr. Hopkins,

Mr. Flower's promise is similar to the one made by Mr. Hopkins. However, in *Flower*, the facts showed that "Mr. Flower made clear his reluctance to relocate without a secure, long-term future with Huntwood" and "Mr. Hunt assured Mr. Flower [that he] would not be discharged without just cause or anything short of serious misconduct." *Id.* at 23. Based on these facts, the court found a bilateral contract. Here, there was a bilateral contract as to employment, but the proposal provisions concerning the sale of the business were vague and incomplete.

In *Ebling*, Edward Gove agreed to pay Neil Ebling a 35 percent commission if he would manage the Westlake office. *Ebling*, 34 Wn. App. at 497. When Mr. Gove later reduced the commission rate and paid a salary, Mr. Ebling terminated his employment and filed suit. The court found that there was "abundant evidence" demonstrating that the agreement was a bilateral contract, but there was no mutual agreement concerning the change in commission. *Id.* at 498-99. In contrast here, the terms of the sale are vague and any bilateral contract formed did not include the sale of the store.

Mr. Hopkins maintains that the Heplers' proposal is a sale of goods under article 2 of the Uniform Commercial Code. Under article 2, a contract may be made in any manner sufficient to show agreement, including by conduct of both parties recognizing the existence of a contract. RCW 62A.2-204(1). Moreover, a sale of goods does not fail

for indefiniteness if the parties have intended to make a contract and if there is a certain basis for giving an appropriate remedy. RCW 62A.2-204(2), (3). Hence, certain open terms will not cause the contract to fail for indefiniteness. RCW 62A.2-305, -308, -309, and -310.

Significantly, the sale provisions of article 2 do not change the rule that a contract is not formed absent a meeting of the minds. *Lakeside Pump & Equip., Inc. v. Austin Constr. Co.*, 89 Wn.2d 839, 845, 576 P.2d 392 (1978). Here, there was no meeting of the minds concerning the sale of the store and there is no basis for giving an appropriate remedy.

Because we conclude that there was no enforceable agreement for the sale of the business, we need not reach the additional issues raised by the parties.

We affirm the trial court's order granting summary judgment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

Schultheis, C.J.

Korsmo, J.